

DOCKET FILE COPY ORIGINAL

ORIGINAL

LAW OFFICES
LEVENTHAL, SENTER & LERMAN P.L.L.C.
SUITE 600
2000 K STREET, N.W.
WASHINGTON, D.C. 20006-1809

TELEPHONE
(202) 429-8970

TELECOPIER
(202) 293-7783

May 15, 2001

RECEIVED

WWW.LSL-LAW.COM

Ross G. Greenberg

MAY 15 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WRITER'S DIRECT DIAL
202-416-6749

WRITER'S E-MAIL
RGREENBERG@LSL-LAW.COM

VIA HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
TW-A325
Washington, DC 20554

Re: **Notice of Proposed Rule Making
In the Matter of Reallocation and Service Rules for the 698-746
MHz Spectrum Band (Television Channels 52-59)
GN Docket No. 01-74**

Dear Ms. Salas:

On behalf of Davis Television Wausau, LLC; Davis Television Corpus Christi, LLC;
Davis Television Fairmont, LLC; and Davis Television Topeka, LLC, I am transmitting herewith
an original and nine copies of their Comments in the above-referenced matter.

Should there be any questions concerning this matter, please contact the undersigned.

Very truly yours,



Ross G. Greenberg

Enclosures

cc (w/encl.): Ms. Lisa Gaisford, Office of Engineering and Technology, Federal
Communications Commission
Mr. G. William Stafford, Commercial Wireless Division, Wireless
Telecommunications Bureau, Federal Communications Commission

No. of Copies rec'd 0 + 9
List A B C D E

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

MAY 15 2001

In the Matter of

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Reallocation and Service Rules for the
698-746 MHz Spectrum Band
(Television Channels 52-59)

)
)
)
)
)

GN Docket No. 01-74

To: The Commission

**COMMENTS OF DAVIS TELEVISION WAUSAU, LLC;
DAVIS TELEVISION CORPUS CHRISTI, LLC;
DAVIS TELEVISION FAIRMONT, LLC;
AND DAVIS TELEVISION TOPEKA, LLC**

I. INTRODUCTION

Davis Television Wausau, LLC ("Davis Wausau"), licensee of television broadcast station WFXS(TV), Channel 55 at Wittenberg, Wisconsin; Davis Television Corpus Christi, LLC ("Davis Corpus Christi"), applicant for a construction permit for a new television broadcast station to operate on Channel 38 at Corpus Christi, Texas and joint petitioner to institute a rule making to amend Section 73.606(b), the Television Table of Allotments, by substituting Channel 53 in lieu of Channel 38, if necessary; Davis Television Fairmont, LLC ("Davis Fairmont"), applicant for a construction permit for a new television broadcast station to operate on Channel 66 at Fairmont, West Virginia and joint petitioner to institute a rule making to amend Section 73.606(b), the Television Table of Allotments, by substituting Channel 55 in lieu of Channel 66; and Davis Television Topeka, LLC ("Davis Topeka"), applicant for a construction permit for a new television broadcast station to operate on Channel 43 at Topeka, Kansas and petitioner to

institute a rule making to amend Section 73.606(b), the Television Table of Allotments, by substituting Channel 55 in lieu of Channel 43, if necessary, by their attorneys, hereby comment on the Commission's Notice of Proposed Rule Making in the above-captioned proceeding, FCC 01-91 (released March 28, 2001) (the "Notice"). Davis Wausau, Davis Corpus Christi, Davis Fairmont and Davis Topeka are commonly owned and are hereinafter referred to as "Davis."

II. BACKGROUND

The Notice seeks comment on a wide ranging set of issues, all related to the proposed reallocation of the 698-746 MHz spectrum band, currently comprising television Channels 52-59. Aspects of the Notice of particular importance to Davis include: (i) the Commission's lack of an acknowledgment that it must establish a first priority to provide digital television ("DTV") channels for incumbent full-power analog (or "NTSC") licensees currently broadcasting on Channels 52-59 that have not yet received a digital allotment, and (ii) the Commission's treatment of pending applications and petitions for NTSC television stations on Channels 52-59. For the reasons set forth below, Davis strongly urges the Commission to take all necessary steps to insure that NTSC licensees broadcasting on Channels 52-59 that have not yet been assigned DTV channels are given first priority in the assignment of an in-core digital channel and that the Commission, consistent with its promise in November of 1999, should allow continued processing of applications and petitions for new NTSC stations on Channels 52-59 that will move to in-core digital channels when they become available and protect these stations from other services until the end of the DTV transition period.

III. IN LIGHT OF THEIR SUBSTANTIAL INVESTMENT AND PROVEN RECORD OF PUBLIC SERVICE, INCUMBENT NTSC CHANNEL 52-59 LICENSEES WITHOUT PAIRED DIGITAL CHANNELS MUST BE GIVEN FIRST PRIORITY IN THE ASSIGNMENT OF IN-CORE DIGITAL CHANNELS

In the Notice, the Commission states that existing NTSC stations and permittees for stations on Channels 52-59 will receive protection from new service providers during the DTV transition period. Notice at ¶ 21. The Commission also notes that there are a substantial number of DTV assignments on Channels 52-59 because the Commission was unable to accommodate a paired digital channel for all broadcasters within the core broadcast spectrum. Id at ¶ 25.

However, the Notice does not acknowledge the fact that there are a number of NTSC stations now operating on Channels 52-59 that have not been assigned a digital pair because they were licensed after the cut-off date which the Commission established in deciding which stations would be assigned a digital channel. Davis Wausau is such a licensee. It received a modified construction permit to build a new television station on Channel 55 in Wittenberg in 1999, and commenced program tests on new full service station WFXS(TV) a mere 9 months later. Davis Wausau has been providing service, including Fox network programming, to area viewers ever since.

Although these licensees have expended substantial resources in building their NTSC stations and serving the public interest, they have not yet been assigned digital channels, and the instant rule making is designed to establish the rules by which their out-of-core channels will be reclaimed at the end of the DTV transition period. The Commission must institute a priority scheme to insure that these NTSC stations operating on Channels 52-59 will make a smooth transition in continuing to provide service, digitally, on an in-core channel in the future. These licensees, at a minimum, should be given first priority in the assignment of viable digital channels once broadcasters with both analog and digital assignments within the core declare

which channels they plan to ultimately use after the transition and the unused spectrum is made available for allocation.¹

For some time, out-of-core NTSC licensees and permittees such as Davis Wausau have been promised the ability to move into the Channel 2-51 core when the Commission identifies the available channels. See Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order, MM Docket No. 87-268, 13 FCC Rcd 6860, ¶¶ 10-16 (1998) (“We shall afford new NTSC permittees, whose applications were not granted on or before April 3, 1997 and who were therefore not eligible for an initial DTV paired license, the choice to immediately construct either an analog or a digital station on the channel they were granted. . . . If they choose the analog option, . . . they may . . . convert their analog facility to DTV at any point during the transition period, up to the end of that period. . . . [S]tations operating outside the core will be doing so on an interim basis only. At the end of the transition period, . . . the Commission will reassign all out-of-core . . . broadcasters, including the currently pending applicants, to channels in the core.”). These licensees and permittees are proceeding in reliance on this promise, pouring very substantial funds and effort into constructing and operating their stations. The Commission should make clear again that their futures will be a first priority in the reallocation of other stations, permits and applications that will be part of the clearing of the 698-746 MHz spectrum band.²

¹ The Commission has established an election date of December 31, 2004 for commercial stations and December 31, 2005 for non-commercial stations. See Notice at ¶ 26 n.68.

² The spectrum congestion has been exacerbated by the protected status afforded qualified Class A LPTV stations on in-core channels.

IV. IN NOVEMBER 1999, THE COMMISSION EXPRESSLY INVITED NTSC APPLICANTS TO PROPOSE REPLACEMENT ALLOTMENTS IN THE 52-59 BAND; THE FCC SHOULD CONTINUE PROCESSING SUCH APPLICATIONS AND PETITIONS AND PROTECT THESE STATIONS FROM OTHER SERVICES UNTIL THE END OF THE DTV TRANSITION PERIOD

In a prior rulemaking, the Commission mandated that applications for then vacant television allotments be submitted no later than September 20, 1996. Allotments not applied for by that deadline would be deleted and lost forever. Sixth Further Notice of Proposed Rule Making, MM Docket No. 87-268, 11 FCC Rcd 10968 (1996). Subsequently, after Congress had mandated the auction of Channels 60-69 and after the Commission decided to limit the DTV channel core to Channels 2-51 and reallocate Channels 52-59, the Commission established a second filing period to allow applicants with certain pending applications for new analog stations to modify their requests both to eliminate technical conflicts with DTV stations and to move from Channels 60-69. See Notice at ¶ 22. This second filing period opened on November 22, 1999 and closed on July 17, 2000. Id. The Public Notice announcing this second filing period expressly invited applicants whose channels had developed conflicts to migrate to Channels 52-59 if necessary. See Mass Media Bureau Announces Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog TV Stations, Public Notice, 14 FCC Rcd 19559, 19562-3 (1999) (“A change of an NTSC allotment channel must be requested by filing a petition for rule making. . . . Specifically, the channel may be in the range from 2 to 59 Where multiple applications have been filed for a single NTSC channel allotment, a petition for rulemaking must propose a single replacement channel (below 60) . . .”). In reliance on this announcement, applicants like Davis Corpus Christi, Davis Fairmont and Davis Topeka

submitted petitions for rule making to amend the Television Table of Allotments as necessary³ to facilitate proposals to locate their proposed stations to Channels 52-59. To the extent these applicants could not find or retain available allotments in the core, they proposed to build their facilities on Channels 52-59 and then move in-core when such a channel was available. The Notice asks for comment on the Commission's treatment of pending applications like those of the Davis entities.

The last of the NTSC applicants have not had an easy time prosecuting their applications. They have been afforded what has amounted to second-class status relative to existing stations, planned DTV stations, new services in the Channel 60-69 band and even qualified Class A LPTV stations. NTSC applicants have had to face the prospect of packing their bags and moving to a different address whenever the Commission has changed its rules and given other stations priority over them or the spectrum available to them has been sliced away. These applications have now been on file at the Commission for a very long time. Davis Corpus Christi, Davis Fairmont and Davis Topeka have had their applications for new NTSC stations on file with the Commission for *four and a half years*. Denying them access to NTSC Channels 52-59 now would be entirely inequitable.

It is particularly troubling that the Commission is now contemplating suspension of the processing of these applications after the Commission expressly invited NTSC applicants to relocate to Channels 52-59 until in-core channels could be secured. In some cases, the denial of access to Channels 52-59 for applicants may be a death knell. Such a fate would be especially

³ NTSC Channel 38 in Corpus Christi and Channel 43 in Topeka are affected by potential conflicting Class A stations, but may remain viable.

harsh because allowing them to move to Channels 52-59 will have at most a minimal impact on an already congested spectrum band.

The Notice itself observes that “given the significant number of analog and DTV incumbents that already exist on [the 52-59] band, the impact [of continuing to process applications for new NTSC stations] on the provision of new services may be marginal.” Notice at ¶ 24. See also id. at ¶ 7 (“This band is significantly . . . encumbered with TV operations.”); ¶ 11 (recognizing “the degree of incumbency”); ¶ 16 (recognizing “the high number of incumbent broadcasters”). Davis agrees that, given the degree of existing congestion in the Channel 52-59 band,⁴ the impact of granting Channel 52-59 proposals like Davis’ will be marginal. The universe of applications for new NTSC stations seeking to operate on Channels 52-59 is small, finite and *cannot* expand.⁵ Under these circumstances, allowing a few more analog permits will, on balance, clearly serve the public interest.

In formulating regulations for clearing the 60-69 band, the Commission recognized that “those persons with pending applications and/or petitions for new full-service NTSC stations on those channels had already invested time, money and effort into their applications and petitions.” Id. at ¶ 23. The same concerns pertain to those applicants that have applied or petitioned for new full-service stations in the 52-59 band. The public interest benefits of allowing these applicants and petitioners to construct their facilities and provide service to the public greatly outweigh the minimal impact they will have on the introduction of new services in the Channel 52-59 band.

⁴ Currently, there are 89 licensed full-service NTSC analog stations, 12 approved construction permits and 165 DTV assignments in the 52-59 band, with the potential for even more DTV assignments to follow. Notice at ¶¶ 21, 25-26.

⁵ “There are pending requests for approximately 57 new NTSC stations” in the 52-59 band. Notice at ¶ 23. This universe includes mere petitions for rule making where no applications have yet been filed.


The Commission should continue to process these applications and petitions and allow these stations to provide service to the public on their temporary channels until they can relocate to permanent homes in the television core.

V. CONCLUSION

There is ample reason for the Commission to affirm the rights of full-power NTSC licensees, applicants and petitioners in the Channel 52-59 band. The Commission should take this opportunity to assure that incumbent licensees find digital homes in the television core and to afford protection to the last few NTSC applicants and petitioners until they, too, can find in-core allotments. The public interest clearly demands that the Commission protect the rights of these parties and thereby facilitate provision of service to underserved markets. Accordingly, for the reasons stated above, Davis requests that the Commission make clear that it will give incumbent full-power NTSC licensees first priority in assigning in-core DTV assignments and continue to process applications and petitions for and protect full-power NTSC stations on Channels 52-59 until they may relocate inside the television core.

Respectfully submitted,

**DAVIS TELEVISION WAUSAU, LLC
DAVIS TELEVISION CORPUS CHRISTI, LLC
DAVIS TELEVISION FAIRMONT, LLC
DAVIS TELEVISION TOPEKA, LLC**

By: 

Dennis P. Corbett
Ross G. Greenberg

Leventhal, Senter & Lerman P.L.L.C.
2000 K Street, N.W.
Suite 600
Washington, DC 20006-1809
202-429-8970

May 15, 2001

Their Attorneys